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Insurance Law—Physical Contact Requirement of MVAIC Law Satisfied Where Hit and Run Vehicle Pushes Another Vehicle Into Claimant

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INSURANCE LAW—PHYSICAL CONTACT REQUIREMENT OF MVAIC LAW SATISFIED WHERE HIT AND RUN VEHICLE PUSHES ANOTHER VEHICLE INTO CLAIMANT

A hit and run vehicle struck another car, pushing it into claimant Eisenberg's car. Claimant sought indemnification for his injuries from the Motor Vehicle Accident Indemnification Corporation,[1] in accordance with the provisions of the Uninsured Motorist Endorsement in his automobile liability insurance policy. Unable to negotiate a settlement with MVAIC, claimant commenced arbitration proceedings. Shortly thereafter, MVAIC applied to the Supreme Court for a stay of arbitration, asserting that under section 617 of the New York Insurance Law proof of direct physical contact between claimant's automobile and the hit and run vehicle is required as a condition precedent to arbitration. The Supreme Court denied MVAIC's application. This order was reversed and a stay granted by the Appellate Division.[2] On further appeal, the Court of Appeals *held* that where it is undisputed that claimant's injuries were sustained in an accident caused by a hit and run vehicle, the physical contact requirement set forth in section 617 was satisfied. The order of the Appellate Division was reversed and that of the Supreme Court reinstated, two judges dissenting. *Motor Vehicle Acc. Indemnification Corp. v. Eisenberg*, 18 N.Y.2d 1, 218 N.E.2d 524, 271 N.Y.S.2d 641 (1966).

MVAIC was created by the New York legislature for the purpose of recompensing innocent victims of motor vehicle accidents.[3] It is a non-profit corporation[4] whose membership comprises every automobile liability insurer issuing policies in New York.[5] The members contribute to a fund from which the awards are granted.[6] Recovery is limited to bodily injury or death arising out of accidents caused by uninsured, unidentified, or financially irresponsible motorists.[7] The statute[8] sets the maximum award at ten thousand dollars for injury or death to one person, and twenty thousand dollars for injuries or deaths in one accident to more than one person. There are two categories of claimants under the statute: *qualified persons* and *insured persons*. *Qualified persons*[9] are defined as New York residents not carrying automobile liability insurance, and residents of any other state having a reciprocal program providing visiting New Yorkers similar coverage. *Insured persons*[10] are defined as owners of

1. N.Y. Sess. Laws 1958, ch. 759, § 2; codified as N.Y. Ins. Law §§ 600-26 [hereinafter referred to as MVAIC].
2. Motor Vehicle Acc. Indemnification Corp. v. Eisenberg, 24 A.D.2d 633, 262 N.Y.S.2d 219 (2d Dep't 1965).
3. See Aksen, *Uninsured Motorist Coverage: A Guide to MVAIC and Arbitration*, 15 Arb. J. 166 (1960), for a general discussion of the MVAIC Law.
4. N.Y. Ins. Law § 602.
5. N.Y. Ins. Laws § 602.
6. N.Y. Ins. Law § 606(f).
7. N.Y. Ins. Law § 600(2).
8. N.Y. Ins. Law § 167(2-a).
9. N.Y. Ins. Law § 601(b).
10. N.Y. Ins. Law § 601(i).

New York automobile liability insurance policies, relatives residing with these policy owners,[11] and occupants of vehicles covered by such insurance policies.[12] These policies must contain an Uninsured Motorist Endorsement.[13] The endorsement "defines the terms, conditions and duties of the insured person desiring to make a claim against [MVAIC] . . . when involved in an accident with an uninsured motorist"[14] or a hit and run vehicle. One such condition governing the *insured person* is an arbitration agreement.[15] The scope of this agreement had been the subject of a heated controversy in the courts[16] until finally resolved by the Court of Appeals.[17] The endorsement was construed as having limited arbitration to two issues: fault, and damages, once fault is established.[18]

A person seeking indemnification from MVAIC must file a claim with the corporation within ninety days of the accrual of the cause of action.[19] If the parties then fail to negotiate a settlement,[20] the *qualified* claimant will "apply to the supreme court for an order permitting him to bring an action against the corporation. . . ."[21] The *insured* claimant, in accordance with the endorsement, will demand arbitration.[22] MVAIC is frequently able to suspend arbitration by petitioning the Supreme Court for a stay. Section 7503(b) of the New York Civil Practice Law and Rules provides that "a party . . . may apply to stay arbitration on the ground that a valid agreement . . . has not

11. Matter of Graber, 38 Misc. 2d 969, 970, 239 N.Y.S.2d 332, 334 (Sup. Ct. 1963).

12. Application of Motor Vehicle Acc. Indemnification Corp., 227 N.Y.S.2d 868, 870 (Sup. Ct. 1961).

13. N.Y. Ins. Law § 167(2-a).

14. Aksen, *supra* note 3, at 168. As of July 1, 1965 the *insured person*, with a claim under the MVAIC Law, must seek indemnification directly from the insurer. The insurer is bound by the terms and conditions prescribed by the board of directors of MVAIC. N.Y. Ins. Law § 167(2-a). For purposes of this Note when an *insured* claimant is involved MVAIC will be treated as synonymous with the *insurer*, because Eisenberg filed his claim prior to the statutory modification.

15. Ward has observed that "compulsory arbitration has been written by the insurers, with the consent of the insurance department, into the New York policies. This immediately eliminates a substantial number of jury cases. It is interesting to speculate on whether this policy decision was made by the legislature, the insurance department or the insurers." Ward, *The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity*, 9 Buffalo L. Rev. 283, 291-92 (1960).

16. The First Department had extended arbitration to all matters over which the parties failed to agree. See, *e.g.*, Matter of Zurich Ins. Co., 14 A.D.2d 669, 219 N.Y.S.2d 748 (1st Dep't 1961); Motor Vehicle Acc. Indemnification Corp. v. Velez, 14 A.D.2d 276, 220 N.Y.S.2d 954 (1st Dep't 1961). The Third Department had limited arbitration solely to fault and damages. See, *e.g.*, Motor Vehicle Acc. Indemnification Corp. v. Brown, 15 A.D.2d 578, 223 N.Y.S.2d 309 (2d Dep't 1961), *appeal dismissed*, 11 N.Y.2d 968, 183 N.E.2d 696, 229 N.Y.S.2d 416 (1962); Matter of Phoenix Assur. Co. of N.Y., 9 A.D.2d 998, 194 N.Y.S.2d 770 (3d Dep't 1959).

17. Rosenbaum v. American Surety Co. of N.Y., 12 A.D.2d 886, 209 N.Y.S.2d 994 (4th Dep't 1961), *rev'd*, 11 N.Y.2d 310, 183 N.E.2d 667, 229 N.Y.S.2d 375 (1962).

18. *Ibid.*

19. N.Y. Ins. Law § 608(a). The *insured person* involved in a hit and run accident must file his claim with the insurer within 30 days. See the standard Uninsured Motorist Endorsement, on the back of any New York auto liability insurance policy.

20. N.Y. Ins. Law § 613. This enables claimant to negotiate the settlement of any claim with MVAIC.

21. N.Y. Ins. Law § 618(a).

22. See N.Y. CPLR §§ 7501, 7503(c).

been complied with. . . ." The stay will be denied[23] if, on the basis of affidavits, the court decides as a matter of law that claimant has compiled with the conditions precedent to arbitration.[24] Where there is a factual question regarding compliance the court will grant MVAIC a stay and order a trial,[25] restricted solely to this issue. If the trier of fact finds that claimant has satisfied the conditions precedent, claimant may then "apply for an order compelling arbitration."[26] In causes of action arising out of hit and run accidents,[27] claimant will be denied recovery unless he establishes that a hit and run vehicle was in fact involved,[28] and that there has been physical contact with such vehicle.[29]

Section 617 of the New York Insurance Law proscribes recovery in hit and run accidents "unless the bodily injury to the insured or qualified person arose out of physical contact of the [hit and run] . . . vehicle causing such bodily injury with the insured or qualified person or with a motor vehicle which the insured or qualified person was occupying at the time of the accident." Failure to prove physical contact has thus barred innocent victims of hit and run accidents from either arbitration (in the case of an *insured* claimant)[30] or litigation (in the case of a *qualified* claimant).[31] Prior to the instant case relief had been denied in situations where the hit and run vehicle struck and pushed an intervening vehicle into claimant.[32] The rationale had always been that the court must construe the statute literally rather than "legislate under the guise

23. N.Y. CPLR § 7503(a). "Where there is no substantial question whether a valid agreement was . . . complied with, . . . the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court." See, *e.g.*, Beakbone v. Motor Vehicle Acc. Indemnification Corp., 20 A.D.2d 736, 246 N.Y.S.2d 843 (3d Dep't 1964) (MVAIC was denied a stay because it had not controverted claimant's allegations.).

24. There are a wide range of conditions precedent to arbitration under the MVAIC Law. See, *e.g.*, Motor Vehicle Acc. Indemnification Corp. v. Brinson, 32 Misc. 2d 946, 228 N.Y.S.2d 508 (Sup. Ct. 1962), *rev'd*, 18 A.D.2d 809, 236 N.Y.S.2d 567 (2d Dep't 1963) (recovery limited solely to bodily injury or death); Kaiser v. Motor Vehicle Acc. Indemnification Corp., 35 Misc. 2d 636, 231 N.Y.S.2d 178 (Sup. Ct. 1962) (Notice of claim must be filed within 90 days.); Motor Vehicle Acc. Indemnification Corp. v. Mahoney, 46 Misc. 2d 3, 258 N.Y.S.2d 801 (Sup. Ct. 1965) (If other vehicle ascertainable, it must have been uninsured at the time of the accident.); Motor Vehicle Acc. Indemnification Corp. v. Oppedisano, 39 Misc. 2d 857, 241 N.Y.S.2d 613 (Sup. Ct. 1963) (If the accident is with a hit and run vehicle, claimant must establish that he was an "occupant" of the insured vehicle.).

25. N.Y. CPLR § 7503(a).

26. N.Y. CPLR § 7503(a).

27. N.Y. Ins. Law § 617.

28. See, *e.g.*, Motor Vehicle Acc. Indemnification Corp. v. Stein, 35 Misc. 2d 1007, 231 N.Y.S.2d 727 (Sup. Ct. 1962).

29. See, *e.g.*, Motor Vehicle Acc. Indemnification Corp. v. McKelvey, 21 A.D.2d 685, 250 N.Y.S.2d 626 (2d Dep't 1964).

30. See, *e.g.*, Motor Vehicle Acc. Indemnification Corp. v. Herrington, 39 Misc. 2d 79, 239 N.Y.S.2d 934 (Sup. Ct. 1963); Motor Vehicle Acc. Indemnification v. Comerchero, 34 Misc. 2d 52, 227 N.Y.S.2d 285 (Sup. Ct. 1962).

31. See, *e.g.*, Matter of Portman, 33 Misc. 2d 385, 225 N.Y.S.2d 560 (Sup. Ct. 1962); Matter of Bellavia, 28 Misc. 2d 420, 211 N.Y.S.2d 356 (Sup. Ct. 1961).

32. See, *e.g.*, Matter of Tuzzino, 42 Misc. 2d 786, 249 N.Y.S.2d 279 (Sup. Ct. 1964), *rev'd*, 22 A.D.2d 641, 252 N.Y.S.2d 961 (1st Dep't 1964), *appeal dismissed*, 16 N.Y.2d 711, 209 N.E.2d 559, 261 N.Y.S.2d 904 (1965). See also cases cited *supra* note 31.

of interpretation."[33] The courts had refused to consider the problem in terms of proximate causation, deciding that the statutory requirement of physical contact precluded such analysis.[34] Dissatisfaction with this result, in situations where the hit and run vehicle was obviously the proximate cause of the accident, has induced scholarly protest.[35] Proximate causation has been commonly utilized in the fields of accident[36] and fire[37] insurance to extend coverage beyond direct losses. Failure to do this under section 617 has resulted in limited coverage, barring recompense to many innocent victims of hit and run accidents.

The primary justification for the physical contact rule has been that it is an evidentiary safeguard, preventing fraudulent claims.[38] In 1961 the New York Court of Appeals abolished the physical impact requirement in the common law action for the negligent infliction of mental distress, proclaiming that "although fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction."[39] The *Eisenberg* decision has extended this tendency by broadly construing section 617. Claimant may now seek indemnification under section 617 without first having to prove direct physical contact with a hit and run vehicle, if he has sufficiently established, as in the instant case, that the latter vehicle caused the accident.[40] California, the only other state with a physical contact requirement embodied in an uninsured motorist law,[41] has similarly construed its statute.[42] Five other states have uninsured motorist laws,[43] but their legislatures, by not imposing a physical contact requirement, have left all determination as to fault to the trier of fact.

In determining whether the claim in the instant case arose out of an accident within the meaning of section 617, *i.e.*, one involving physical contact between a hit and run vehicle and claimant's vehicle, the Court first ascertained the legislative purpose in enacting the MVAIC Law and then decided that a literal interpretation of the wording in section 617 would frustrate rather than serve that purpose. The Court stated that because hit and run accidents were "easy to allege and difficult to disprove," section 617 was necessary to prevent

33. Matter of Bellavia, 28 Misc. 2d at 422, 211 N.Y.S.2d at 358.
34. Matter of Portman, 33 Misc. 2d at 387, 225 N.Y.S.2d at 563.
35. See, *e.g.*, Aksen, *Arbitration of Uninsured Motorist Endorsement Claims*, 24 Ohio St. L.J. 589, 602 (1963); Mulligan, *Insurance*, 14 Syracuse L. Rev. 260, 263 (1962).
36. See cases cited in Annot., 108 A.L.R. 6, 8-21 (1937).
37. See cases cited in Annot., 76 A.L.R.2d 1137, 1141-50 (1961).
38. See generally Note, 29 Brooklyn L. Rev. 286, 295 (1963).
39. Battalla v. State, 10 N.Y.2d 237, 240, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 37 (1961), *reversing* 11 A.D.2d 613, 200 N.Y.S.2d 852 (3d Dep't 1960) *and reinstating* 17 Misc. 2d 548, 148 N.Y.S.2d 1016 (Ct. Cl. 1959).
40. Instant case at 5, 218 N.E.2d at 526, 271 N.Y.S.2d at 644.
41. Cal. Ins. Code § 11580.2.
42. Inter-Insurance Exch. of Auto. Club of So. Cal. v. Lopez, 238 A.C.A. 516, 47 Cal. Rptr. 834 (Dist. Ct. App. 1965).
43. Md. Ann. Code art. 66-1/2, § 167 (1957); N.H. Rev. Stat. § 268.15 (1957); N.J. Stat. Ann. § 39: 6-78 (1961); N.D. Rev. Code § 39-17-03.1 (1957); Va. Code Ann. § 38.1-381(b) (Supp. 1953).

fraudulent claims.[44] Since there was no possibility of fraud, the Court considered the instant case analogous to those situations where the hit and run vehicle strikes a claimant directly.[45] The Court concluded that section 617 had therefore been satisfied and should not "logically serve to insulate the respondent [MVAIC] from arbitration."[46] The majority thus construed section 617 so that its meaning conformed to the main purpose underlying the MVAIC Law.[47] The dissent, on the other hand, insisted that the statute be construed strictly,[48] for if the legislature had intended that "physical contact" be broadened to include contact with a third vehicle, it could have expressly provided for such a meaning.[49]

The physical contact requirement has shielded MVAIC from having to defend against unsubstantiated claims. *Motor Vehicle Acc. Indemnification Corp. v. Lupo*[50] exemplifies the protection afforded by section 617. Claimant was injured when his automobile struck a telephone pole. He alleged that he had swerved to avoid colliding with another automobile. The police report of the accident did not establish either physical contact or the existence of a hit and run vehicle. The court, in accordance with section 617, granted MVAIC a stay of arbitration. Under a broad interpretation of the *Eisenberg* decision, the absence of physical contact need not bar an *insured* claimant from arbitration. A court would deny MVAIC's motion for a stay if it found as a matter of law that a hit and run vehicle was the proximate cause of claimant's injuries. Yet it is apparent from the language in *Eisenberg* that the Court intended to define and not to eliminate the requirement. Physical contact must still be shown, although not necessarily the direct physical contact previously needed.

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44. Instant case at 4, 218 N.E.2d at 526, 271 N.Y.S.2d at 644.

45. *Ibid.*

46. *Id.* at 4, 218 N.E.2d at 526, 271 N.Y.S.2d at 643.

47. The Court was thus following a line of authority in New York which adhered to the rule that the construction of a statute must be consistent with the policy behind it. See, *e.g.*, Bright Homes v. Wright, 10 A.D.2d 355, 199 N.Y.S.2d 931 (4th Dep't 1960), *rev'd*, 8 N.Y.2d 157, 168 N.E.2d 515, 203 N.Y.S.2d 67 (1960); Surace v. Danna, 221 App. Div. 785, 223 N.Y. Supp. 918 (4th Dep't 1927), *rev'd*, 248 N.Y. 18, 161 N.E. 315 (1928); Matter of Meyer, 156 App. Div. 930, 141 N.Y. Supp. 1131 (1st Dep't 1913), *aff'd*, 209 N.Y. 386, 103 N.E. 713 (1913). *But see* New Amsterdam Cas. Co. v. Stecker, 208 Misc. 858, 145 N.Y.S.2d 148 (Sup. Ct. 1955), *rev'd*, 1 A.D.2d 629, 152 N.Y.S.2d 879 (1st Dep't 1956), *aff'd*, 3 N.Y.2d 1, 143 N.E.2d 357, 163 N.Y.S.2d 626 (1957).

48. See, *e.g.*, Berger v. City of New York, 173 Misc. 1070, 17 N.Y.S.2d 945 (Sup. Ct. 1939), *aff'd*, 260 App. Div. 402, 22 N.Y.S.2d 1006 (2d Dep't 1940), *aff'd*, 285 N.Y. 723, 34 N.E.2d 894 (1941); Leppard v. O'Brien, 225 App. Div. 162, 232 N.Y. Supp. 454 (3d Dep't 1929), *aff'd*, 252 N.Y. 563, 170 N.E. 144 (1929). See generally Sutherland, Statutes and Statutory Construction § 371, at 472 (1st ed. 1891) ("If a statute creates a liability where otherwise none would exist, or increases a common-law liability, it will be strictly construed.").

49. Instant case at 6, 218 N.E.2d at 526, 271 N.Y.S.2d at 645.

50. 18 A.D.2d 717, 236 N.Y.S.2d 464 (2d Dep't 1962), *aff'd*, 13 N.Y.2d 1017, 195 N.E.2d 307, 245 N.Y.S.2d 596 (1963). See Motor Vehicle Acc. Indemnification Corp. v. Downey, 15 A.D.2d 893 (1st Dep't 1962), *rev'd*, 11 N.Y.2d 995, 183 N.E.2d 758, 229 N.Y.S.2d 745 (1962) (Claimant's auto struck bridge after alleged contact with hit and run vehicle, but passenger denied existence of such vehicle—arbitration stayed and hearing ordered.).

> We thus think that where . . . claimant has established an accident with a hit and run vehicle involving physical contact, the Legislature did not intend to impose the further burden of requiring claimant to establish *direct* physical contact without the intervention of another automobile.[51]

The Court undoubtedly felt that the protection against fraud would be diluted if the condition precedent were not preserved.[52] There is another reason for interpreting *Eisenberg* as having retained this somewhat modified physical contact rule. The Uninsured Motorist Endorsement in the standard New York automobile liability insurance contract contains both an arbitration agreement and a provision that *insured* must establish physical contact to recover in an accident with a hit and run vehicle.[53] Arbitrators normally respect the contractual obligations of the parties. Because an *insured* claimant is contractually bound by the provisions in his insurance policy, he will be barred from recovery if he has not complied with the endorsement provisions. If the courts were to interpret the *Eisenberg* decision broadly, in many instances the *insured* claimant would be permitted to arbitrate, yet be denied recovery by the arbitrator for failing to satisfy the endorsement's terms. It would thus breed inconsistency to interpret *Eisenberg* as having eliminated the requirement judicially from the statute.

Physical contact should not be a condition precedent to recovery in hit and run accidents. Failure to conform to the requirement has precluded many innocent victims from recompense. The unfortunate driver who receives massive injuries, after swerving to avoid collision with an errant hit and run vehicle, is denied relief under the present MVAIC law. If the requirement were eliminated entirely the trier of fact could then base recovery on the common law negligence theory of proximate cause. It might be argued that reliance on such a theory would result in a flood of fraudulent claims. The simple answer is that just as the courts have utilized proximate causation in other areas of the law, there is no reason why it cannot be adopted here. A claimant will still have the burden of proving his case, yet he will not be automatically barred for not having established physical contact. The *Eisenberg* decision is not the solution, for the court preserved the requirement although in modified form. The elimination of the requirement can be achieved either by an unequivocal interpretation of section 617 by the Court of Appeals, or by legislative amendment. The State Insurance Department would then undoubtedly conform by deleting "physical contact" from the Uninsured Motorist Endorsement. The New York Legislature has resisted all attempts to strike the requirement

51. Instant case at 5, 218 N.E.2d 526, 271 N.Y.S.2d at 644.
52. *Ibid.*
53. The standard endorsement includes the following language: "hit-and-run automobile' means an automoble which causes bodily injury to an insured arising out of physical contact of such automobile with insured or with an automobile which the insured is occupying at the time of the accident. . . ."

from the statute.[54] Until the MVAIC Law is relieved of this formalistic evidentiary safeguard, "physical contact" as defined in *Eisenberg* must remain operative as a condition precedent to the presentation of hit and run claims.

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INTERNATIONAL LAW—TREATY STATING THAT JURISDICTION OVER THE DISPOSITION OF MOVABLES IS TO BE DETERMINED BY THEIR SITUS CONSTRED TO MEAN THAT MOVABLES MUST BE DISPOSED OF BY THE LAW OF DECEDENT'S DOMICILE

An American citizen residing in Switzerland died testate in 1954, leaving his entire estate, which included personal property in both Switzerland and New York, to his widow. Also surviving the decedent was his acknowledged illegitimate son who would be entitled, under a Swiss statute, to a nine-sixteenths share of the estate, notwithstanding the will. Two weeks after the decedent's death, as a result of an ex parte proceeding before a Swiss Justice of the Peace, the widow obtained the Swiss equivalent of a simple probate, declaring her the sole heir under the will unless and until a formal contest was initiated. The widow then brought the Swiss personalty to New York. In 1957, the son took part in a New York probate proceeding which found the decedent to be a New York domiciliary and, in effect, barred the son from a 1958 accounting proceeding. In 1958 the son secured a decree from a Swiss appellate court declaring the decedent to have been a Swiss domiciliary, and granting him the statutory share of the estate. In 1961, he brought an action in the New York County Surrogate's Court to vacate or reopen that court's 1957 and 1958 decrees. The son contended that according to article VI of the Swiss-United States Treaty of 1850,[1] succession to the personalty was to be decided by Swiss courts according to Swiss law and, thus, the New York Surrogate's Court had no subject matter jurisdiction beyond directing the widow to return the property to the jurisdiction of the Swiss courts. The Surrogate denied his application and the Appellate Division affirmed the denial without a written opinion.[2] The Court of Appeals affirmed in a four-three decision. *Held*, despite the wording of the treaty, its interpretation should be that jurisdiction over movables is in the courts of and governed by the laws of the decedent's domicile. Therefore, petitioner is estopped from challenging

54. Four months before the *Eisenberg* decision a bill was introduced in the New York Legislature which would have deleted the physical contact requirement from section 617. It passed in the Assembly but was defeated in the Insurance Committee of the Senate. S.2040, A.4202, 189th N.Y. Legis. (1966).

1. Treaty of Friendship, Commerce, Reciprocal Establishment, and Extradition of Criminals With Switzerland, Nov. 25, 1850, 11 Stat. 587 (1850), 16 Martens N.R.G. (1e sér.) 25, T.S. No. 353 [hereinafter cited treaty].

2. 24 A.D.2d 705, 261 N.Y.S.2d 602 (1st. Dep't 1965).